NO. 89-994

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

WEST VIRGINIA UNIVERSITY
HOSPITALS, INC.,
Petitioner,

v.

ROBERT CASEY, Governor of the Commonwealth of Pennsylvania, JOHN F. WHITE, Secretary of the Pennsylvania Department of Public Welfare, and DAVID S. FEINBERG, Director of the Bureau of Policy and Program Development of the Pennsylvania Department of Public Welfare,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF THE CASE

1. After a six day non-jury trial, the District Court declared that Pennsylvania's system of reimbursing out-of-state providers of Medicaid services, such as petitioner, violated federal statutory and constitutional law (42 U.S.C. § 1396a(a)(13)(A) and the Fourteenth Amendment), and awarded the petitioner attorney's fees under 42 U.S.C. § 1988. Pet. App. at B-67 and 68. The District Court directed counsel to submit a joint fee proposal. Pet. App. at B-68 and C-1.

The joint fee proposal listed $350,000 attributable to attorney's fees, $104,133 attributable to expert witness fees and costs and $45,867 attributable to disbursements. Pet. App. at C-1. The respondents argued that the District Court could not award

under 42 U.S.C. § 1988 any portion of the claimed expert witness fees and costs of $104,133, "bas[ing] their assertion that expert witness fees are [not] available under Section 1988 on ... Crawford Fitting Company v. J.T. Gibbons, Inc., 482 U.S. 437, 107 S.Ct. 2494 (1987)." Pet. App. at C-2.

The District Court disagreed with the respondents, finding that "Crawford does not affect our circuit's law on the issue of expert witness fees under Section 1988," and awarded the full amount claimed. Pet. App. at C-4.

2. In the Court of Appeals, respondents challenged the award of expert witness fees and the Court of Appeals agreed with them, ruling that 42 U.S.C. § 1988 "as presently drafted does not authorize expert fee awards in excess of the statutory cap of thirty

dollars per day provided in [28 U.S.C. §] 1821(b)." Pet. App. at A-48.

The Court of Appeals followed Crawford, stating that it "seems to dictate that, even in the case of a fee shifting statute such as section 1988, a court may not award fees in excess of the statutory maximum of thirty dollars a day unless the fee shifting statute expressly makes such an allowance." Pet. App. at A-46. The Court of Appeals noted the Court's "disfavor for '[a]ny argument that a federal court is empowered to exceed the limitations explicitly set out in sections 1920 and 1821 without plain evidence of congressional intent to supersede that section'" and noted the Court's admonition in Crawford that it "will not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or any

other provision not referring explicitly to witness fees." Pet. App. at A-46.

Accordingly, "constrained by the language of Crawford", and "defer[ring] to legislative fiat", the Third Circuit "abandon[ed] [its] previous rule" and "limit[ed] expert witness fees to thirty dollars a day." Pet. App. at A-47.

The Hospital has petitioned for certiorari on this issue and the respondents oppose the granting of such a writ for the reasons which follow.

REASONS FOR DENYING THE WRIT

A. The Petition Presents No Important Issue for Resolution.

In ruling that expert costs were limited to the statutory rate of thirty dollars per day prescribed by 28 U.S.C. § 1821, the Court of Appeals did no more than to apply correctly the straightforward holding of Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). The petition therefore presents no difficult or important issue for resolution by the Court.

In Crawford, the Court held "that when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limits of 28 U.S.C. § 1821, absent contract or explicit statutory authority to the contrary." Id. 482 U.S. at 439. The Court pointed out that

Congress in enacting 42 U.S.C. § 1988 only broadened the "availability of attorney's fees" and that Congress "has not otherwise 'retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors'." Crawford, 482 U.S. at 444. Section 1988 does not permit a court to award a reasonable expert witness fee as part of the costs nor does it allow the court to award a reasonable expert witness fee as part of the reasonable attorney's fee which may, under 42 U.S.C. § 1988, be awarded as part of the costs.[1] This is true even if "the use of the experts was 'indispensable to the determination of the case'

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[1]For example, the Clean Air Act, 42 U.S.C. §7604(d), expressly provides for attorneys fees and expert witness costs. When Congress wants to allow these, it says so.

or 'played a crucial role in the resolution of the issues presented'". Black Grievance Committee v. Philadelphia Electric Co., 690 F.Supp. 1393, 1404 (E.D.Pa. 1988) (quoting Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d 201 (3d Cir. 1981)).

Pursuant to 28 U.S.C. § 1821, witness fees are limited to flat daily attendance fees and subsistence allowances. No provision is made for compensation of experts. Crawford, 482 U.S. at 445. Because Congress provided no relief from 28 U.S.C. § 1821's limits as to expert witness fees when it enacted 42 U.S.C. § 1988, the rule remains "that a federal court may tax expert witness fees in excess of the thirty dollar day limit set out in § 1821 only when the witness is court appointed." Crawford, 482 U.S. at 442.

The Court of Appeals properly reversed the District Court, following the clear direction of the Court in Crawford.[2]

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[2]Other jurisdictions agree with the Third Circuit, and have relied on Crawford to limit or deny expert fees. See ECOS v. Brinegar, 671 F.Supp. 381 (M.D.N.C. 1987) (expert witness fees denied in a § 1983 case); Denny v. Westfield State College, 880 F.2d 1465 (1st Cir. 1989) (expert witness fees denied under Title VII, 42 U.S.C. § 2000e-5(k)); Leroy v. City of Houston, 831 F.2d 576 (5th Cir. 1987) (expert witness fees denied under the Voting Rights Act, 42 U.S.C. § 1973l(e)); Huertas v. East River Housing Corp., 674 F.Supp. 440 (S.D.N.Y. 1987) (expert witness fees denied under Title VII, Fair Housing Act, 42 U.S.C. § 3601, et seq., and 42 U.S.C. §§ 1981 and 1982); Freeman v. Package Machinery Company, 48 E.P.D. ¶38,456 (1st Cir. Nov. 2, 1988) (CCH) (Crawford casts "doubt . . . the district court's ability to award expert witness fees in excess of the $30-per-day ceiling. ..." 48 E.P.D. at 54,566); See also Sevigny v. Dicksey, 846 F.2d 953 (4th Cir. 1988) (§ 1983 action but claim for fees addressed to the general equitable powers of the court); Davis v.

(FOOTNOTE CONTINUED ON NEXT PAGE.)

Missouri v. Jenkins, No. 88-64 slip op. (U.S. June 19, 1989), cited by petitioner, does not cast doubt on the holding of Crawford. Jenkins did not concern reimbursement for expert witness fees, as did Crawford, and the result in Jenkins was therefore not circumscribed by the limits of 28 U.S.C. § 1821. Rather, Jenkins allowed compensation for law clerks and paralegals, members of an attorney's staff, as a component of a reasonable attorney's fee pursuant to 42 U.S.C. § 1988. Because these employees were not witnesses, 28 U.S.C. § 1821 did not come into play, and there is thus no tension between the holdings in Crawford and Jenkins.

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE.)

Richmond, Fredericksburg and Potomac R.R., 803 F.2d 1322 (4th Cir. 1986) (Title VII, 42 U.S.C. § 2000e (pre Crawford) (§ 1988 does not provide statutory authority to award compensation for non-legal experts).

B. The Petition Does Not Establish a Conflict Among the Circuits.

Petitioner relies heavily on what it calls a "multi-circuit conflict" in which the decisions of the First, Third, and Fourth Circuits are pitted against those of the Seventh, Eighth and Tenth. Pet. at 6. Petitioner exaggerates.

The Seventh Circuit's decision in Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989), is inapposite. Although the Court of Appeals purported to answer the question of "whether the judge in a civil rights case may order the losing party to reimburse the cost incurred by the winner to hire an expert witness" id. at 512-513, the Seventh Circuit had already established, before Crawford, the rule that "lawyers' out-of-pocket expenses of travel, investigation,

and other trial preparation," were awardable under 42 U.S.C. § 1988. Id. at 513. No one challenged this rule in the appeal before the Seventh Circuit, ibid., and that court's comments on the issue are therefore no more than dicta.[3]

The Eighth Circuit in SapaNAJIN v. Gunter, 857 F.2d 463 (8th Cir. 1988), disposed of the issue perfunctorily, in one paragraph with little or no analysis,

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[3]Moreover, Jenkins did not, as suggested in Friedrich, "read the statute [§ 1988] to allow as part of the 'reasonable attorney's fee' the award of paralegal fees, even though paralegals are not attorneys," 888 F.2d at 513. That issue had been conceded by Missouri in Jenkins. Also, the statement in Friedrich that "'reasonable attorney's fee' s a shorthand expression for such fees and other expenses as the District Court might in the exercise of its equitable descretion reasonably believe should be reimbursed to the prevailing party," 888 F.2d at 518, is dictum.

id. at 465, and without the benefit of the Third Circuit's thorough analysis in this case.

Finally, the Tenth Circuit decided Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983) four years before Crawford. Given the Court's direction in Crawford, the Tenth Circuit might well decide the issue differently today.

The Court is thus not yet faced with a square conflict among the Circuits, if indeed it will ever be. It would be premature for the Court to step in and settle a conflict which further developments may prove illusory. In the meantime, this issue will benefit from further seasoning in the lower courts.

CONCLUSION

The petition for certiorari of West Virginia University Hospitals, Inc. should be denied.

Respectfully submitted,

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